MONTANA FOURTEENTH JUDICIAL DISTRICT COURT

MEAGHER COUNTY

CHARLES B. LUCAS; LUCAS RANCH, INC.; MONTANA FARM BUREAU FEDERATION; and THE MONTANA TAXPAYERS' ASSOCIATION, Petitioners, -vs- MONTANA DEPARTMENT OF REVENUE, Respondent.	Cause No. DV-10-02 ORDER DENYING PETITIONER'S MOTION FOR CLASS CERTIFICATION

This matter came before the Court for oral argument on December 7, 2010, pursuant to the Court's Order Setting Hearing on Petitioners' Motion for Class Certification filed April 9, 2010. Petitioner' counsel, Michael Green, appeared in person, as did Respondent's counsel, Michael McMahon and C. A. Daw.

Prior to oral argument, Petitioners and Respondent (hereinafter referred to as "DOR") supported their positions with legal briefs and other supporting documentation. Respondent also submitted the affidavit of Dallas Reese that included various supporting documents. In addition to the foregoing, and prior to oral argument, the Court reviewed the Court file.

During oral argument, Petitioners called Charles Lucas and Nancy Higgins-Schlepp to testify. Mr. Lucas and Ms. Schlepp were examined and cross-examined. Petitioners' exhibits Lucas 1 through 10 were admitted as well during the hearing. Respondent called Dallas Reese to testify. He was

examined and cross examined. Respondent's Exhibits A through M were admitted during the hearing.

The Court, having reviewed the submitted documents, the cited cases and statutes, the Court file, including the motion, the parties' respective briefs, Mr. Reese's affidavit, Respondent's discovery responses filed by Petitioner, as well as considered Mr. Lucas, Ms. Schlepp and Mr. Reese's hearing testimony, as well as the parties' respective hearing exhibits, and for good cause appearing hereby enters its Order Denying Petitioners' Motion for Class Certification.

DISCUSSION

A. STANDARD OF REVIEW

Montana district courts have the broadest discretion when deciding whether to certify a class. *McDonald v. Washington*, 261 Mont. 392, 399, 862 P.2de 1150, 1154 (1993). In this regard, a trial court's decision relative to a class certification request is accorded the greatest respect because it is in the best position to consider the most fair and efficient procedure for conducting any given litigation. *McDonald*, 261 Mont. at 399-400, 862 P.2d at 1154.

B. BACKGROUND

For the most recent Montana Class 3 property cyclical reappraisal, approximately 280,000 agricultural parcels were evaluated. (Reese Affidavit, ¶ 7.) This reappraisal process for agricultural property was the most comprehensive and detailed in almost 45 years. *Id.* In one manner or another, each parcel was analyzed. This would have included either or a combination of a: field review, desktop review by appraisers, aerial photograph parcel review, and soil survey reviews of the parcels. *Id.* In addition, DOR considered any and all owner supplied information. *Id.* For example, from December 10, 2008 through March 1, 2009, DOR conducted a "map" mailing to property owners. *Id.* This process consisted of mailing aerial photographs that depicted DOR's most recent information of the respective parcels' classification and productivity as known by DOR. *Id.* Owners were requested to correct any errant classification and/or productivity information relative to the parcel's classification and production and return the maps to DOR. *Id.* If the maps were not returned, DOR presumed the information was accurate. DOR accepted owner responses to the map mailing into November 2009. Approximately ten (10%) percent of the owners

returned the maps with corrected information.

In determining the 2009 Class 3 property values multiple steps were undertaken pursuant to the valuation formula and processes set out in Title 15, Chapter 7, Part 2. *Id.* at ¶ 8. The process is one of determining an income for the land that is derived from agricultural productivity and then translating that income to a property value through the use of a rate divisor. *Id.* For agricultural land, the initial administrative steps were to identify the land use or "classification".

Classification is based on the land's actual use and how that use fits into one of five classification categories used by DOR. *Id.* at ¶ 9. The five classifications are: (a) grazing land; (b) non-irrigated summer fallow farm land; (c) irrigated land; (d) non-irrigated continuously cropped hay land; and (e) non-irrigated continuously cropped farmland. *Id.*

After determining the classification, productivity (yield) for each of the classifications is ascertained. *Id.* at ¶ 10. For the 2009 valuation, the United States Department of Agriculture Natural Resource Conservation Service (USDA NRCS) soil survey was used as an objective, scientific and statewide source of data. *Id.* The Governor's Agricultural Land Advisory Committee ("GALAC") recommended that DOR use the NRCS soil survey. *Id.* Information pertaining to the Committee's recommendation for the use of the NRCS soil survey for agricultural land productivity was presented to various Revenue and Transportation Interim Committees beginning in 2007 and to the Select Committee on Reappraisal during the 2009 Legislative Session. *Id.*

For each of the five land classification, production information specific to each land classification is captured from the NRCS soil survey and is assigned to each acre of land. *Id.* at ¶ 11. Since Montana conducts its property tax appraisals on a statewide basis (as opposed to county by county as is done in most other states) a crop or carrying capacity must be applicable to all landowners across the state. *Id.* As a result, GALAC has recommended the use of the following crops for determination of crop production or grazing land carrying capacities.

a. For non-irrigated summer fallow farm land and non-irrigated continuously cropped farm land the crop used to determine productivity is the number of bushels of spring wheat that an acre of land can produce. Spring wheat can

be grown in all locations of Montana. It may not be grown as a matter of individual economic decisions but it is the only small grain crop that can be grown across the state.

b. For irrigated land and non-irrigated continuously cropped hay land the base crop is the number of tons of alfalfa hay that can be produced per acre. Alfalfa hay is the predominant crop grown on irrigated land in the state and is generally included as either the predominant crop or as a part of the hay production associated with non-irrigated hay production. For irrigated land the base crop is the tons of alfalfa hay that may be grown under irrigation practices. For non-irrigated hay land the base crop is the number of tons of non-irrigated alfalfa hay that can be grown per acre.

c. For grazing land the carrying capacity is expressed as the number of animal unit months per acre (AUM/ac) that the land can support. Carrying capacity should reflect the ability of the land to support grazing activity without injurious effect to the vegetation.

Id. Following the determination of productivity from the NRCS soil survey, adjustments are made to reflect "average management" per 15-7-201(7)(e), MCA. *Id.* For summer fallow farm land and continuously cropped farm land, the soil survey spring wheat productivity is adjusted by a 12 year countywide average production for spring wheat obtained from Montana Agricultural Statistical Services. *Id.* This adjustment was a recommendation by GALAC. *Id.* For irrigated land an adjustment factor is applied to the soil survey estimate of the tons of irrigated alfalfa production per acre. *Id.* The irrigated adjustment factor is determined through information provided by producers in each county. *Id.* While the irrigated adjustment factor is generally a countywide adjustment, there are circumstances where DOR discovered information provided in the landowner responses that indicated the irrigated adjustments should be more localized. *Id.* In those counties multiple adjustment factors were determined and were applied to the appropriate areas within the county. *Id.*

For non-irrigated hay land DOR used a "step through" approach as recommended by GALAC. *Id.* This approach works as follows: the base crop used for productivity on non-irrigated hay land is "alfalfa hay." *Id.* When alfalfa hay information wasn't available in the soil survey, DOR used "grass hay" production information from the soil survey. *Id.* If neither alfalfa hay nor grass hay were available, DOR used "grass legume" hay production information from the soil survey. *Id.* When none of those three were available, DOR used the pounds of air-dry herbage from the soil survey and divided by 2,000 pounds to convert that figure to tons/acre. *Id.* If

none of those were available, DOR defaulted to a state-wide minimum production figure of .07 tons/acre for non-irrigated hay. *Id.*

The most recent GALAC undertook a study of grazing land carrying capacity in the state and, based on the results of the study, suggested an approach to determining the carrying capacity of grazing land. *Id.* The Committee felt that the carrying capacity of grazing land would not change significantly over time and their recommended approach was an attempt to ensure that significant changes did not occur. *Id.*

Section 15-7-201(3), MCA, requires that the value of agricultural land be based on its "productive capacity" as opposed to actual productivity. Section 5-7-201(4), MCA, identifies the valuation formula that is to be used in the determination of agricultural land values. In this regard, DOR is required to determine the value on a per-acre basis. Mont. Code Ann. § 15-7-201(4)(a) and 4(b). Section 15-7-201(5)(a) states that "[N]et income must be determined separately in each land use based on production categories."

After determining the classification and productivity, the productivity was multiplied times a seven year Olympic average (2001-07) commodity price determined by Montana agricultural statistical data from sources set out in section 15-7-201(5), MCA. *Id.* at ¶ 15. This produces a "gross income" per acre. *Id.* The data source for all commodity price information is the Montana Agricultural Statistical Service, an office of the USDA National Agricultural Statistical Service. *Id.* Commodity price information for the 2009 appraisal cycle are the seven (7) year Olympic average (15-7-201-(5)(d) prices for:

a. Price per bushel of spring wheat: $4.58 per bushel. This price includes a $0.59 influence from the Federal Agriculture Improvement and Reform Act of 1996 (1996 Farm Bill) and Farm Security and Rural Investment Act of 2002 (2002 Farm Bill)

b. Price per ton of alfalfa hay: $63.04 per ton. Per 15-7-201(5)(c) the price per ton of alfalfa hay has been reduced to 80% of the average price.

c. Price per animal unit month of grazing: $15.72 per animal unit month ("AUM").

By multiplying the productivity by the commodity price, the result is a "gross income" per acre. *Id.*

After determining gross income per acre, different approaches are used to arrive at "net income" per acre. *Id.* at ¶ 16. The approaches DOR uses to determine net income have been recommended to DOR by GALAC and have been in place since 1993. *Id.*

For grazing land, a 25% reduction to the gross income is allowed to reflect landowner costs for maintenance. *Id.* After the 25% reduction, the remaining income is considered the net income. *Id.* Once net income is determined, DOR calculates the net income per acre by multiplying the productivity from the NRCS soil survey (expressed on a per-acre basis) times the net income. *Id.* This calculation yields the net income per acre for grazing land.

For all other classifications, a "crop share approach" is used to determine net income. *Id.* at ¶ 17.

For non-irrigated summer fallow farm land, the typical crop share of 25% of gross income received by the landowner is considered the net income. *Id.* The remaining 75% is the tenants' share of income and includes all farming expenses. *Id.* For non-irrigated summer fallow farm land as defined by DOR and per the recommendation of GALAC, the crop share used in the determination of per-acre net income is 12.5%. *Id.* This crop share recognizes that income from non-irrigated summer fallow farm land, as defined by DOR, is being received every other year. *Id.*

For irrigated land, the crop share used by DOR is 25% of the income to the landowner and 75% to the tenant. *Id.* The typical crop share arrangement for irrigated land is 33% to the landowner and 67% to the tenant. However, the various Agricultural Land Advisory Committees reduced the typical crop share by an additional 25%, yielding a 25% crop share for irrigated land. *Id.* The 25% crop share is atypical for irrigated lands but is an attempt by GALAC to recognize unexplained but acknowledged "other expenses" associated with irrigated land production. *Id.* From the landowners 25% crop share an additional expense allowance for the application of water to the irrigated land is also allowed. *Id.* The additional water expense includes sections 15-7-201-5(b)(iii) and 5(b)(A), MCA, defined base costs and labor costs. *Id.* In addition, an expense allowance is granted for the landowner specific per-acre energy costs needed to apply the water to the lands. *Id.* After deducting the allowable water costs, the resulting income is considered the net

income per acre. *Id.*

For non-irrigated continuously cropped hay land, the recommended crop share is 25%, with the remaining 75% considered to be the tenants' share which includes the production expenses. *Id.* The 25% crop share is the net income per acre. *Id.*

For non-irrigated continuously cropped farm land the recommended crop share is 25%. DOR's definition of non-irrigated continuously cropped farm land recognizes that income from this farm land is received every year so no further adjustment is included. *Id.* The 25% crop share is considered the net income per acre. *Id.*

Once the determination of net income per acre has been determined for each particular classification, the net income per acre is divided by the section 15-7-201(4)(c), MCA, capitalization rate of 6.4% to determine the per acre value or "assessed value per acre". *Id.* The number of acres of a particular production category are multiplied by the per acre value to determine the value for the acres in that particular production category. *Id.* All values from all production categories are added together to get the total value for that particular land classification, i.e. the assessed value for that particular land classification. *Id.*

After determining the total assessed value for any particular land classification, and totaling the assessed values of all land classifications for the parcel, the total assessed value is multiplied by the current taxable percentage to yield the taxable value for the parcel. *Id.* at ¶ 18. Under sections 15-6-133 and 134, MCA, Class 3 property taxable percentage is the same as the Class 4 rate.

Once the current appraisal cycle assessed value is determined for the affected classes of property, a phase in process is mandated by section 15-7-111, MCA, to mitigate the impact of changes in assessed value that have occurred over the six year assessment cycle. *Id.* at ¶ 19. DOR has rules with respect to how this determination of the phase in value is accomplished. *Id.* The determination of the phase in value requires judicious application because many valuation changes result from processes other than the simple accretion of price over time. *Id.* For example, a farmer may apply irrigation to a formerly dry parcel. *Id.* Such a tangible change and its attendant change in value are not the result of periodic reappraisal but occur by action of the owner changing the

productive use of the property and should not, in fairness, be subject to the phase in. *Id.* Changes in dollar values - such as the market value of a house (separate from physical changes) or of the value of agricultural commodities have been phased-in over the length of reappraisal cycles. *Id.* Both statute and administrative rules acknowledge this procedure and provide a process for this calculation. *Id.*

In contrast, physical changes are not phased-in pursuant to statute and administrative rule. *Id.* When DOR discovers a change to the physical characteristics of any property that result in a classification change, that change in classification is implemented immediately in the year following discovery. *Id.* Petitioners contend any increases in value, including increased values based on any physical change, must be phased in over the appraisal cycle at the rate of 16.66% per year under section 15-7-111, MCA. DOR disagrees.

DOR contends that the property is classified as it existed at the time of discovery. *Id.* A professional appraiser can only value what is actually, physically present in total at the time of discovery. *Id.* The physical characteristics of the property are either grazing land or irrigated farm land, either a two-bedroom home or a four-bedroom home; the appraiser cannot pretend that the property is some mixture or combination. *Id.* A reclassification is not subject to phase-in provisions, neither by statute nor by administrative rule. *Id.* This is how DOR has consistently and historically administered these issues. *Id.* The manner of this administration and its interpretation affects how the base value is determined for the phase in process. Regardless of the means to its determination, this base value is called a value before reappraisal ("VBR"). *Id.*

Another example DOR believes is germane to this case is as follows: two farmers with neighboring parcels as noted in DOR's files based upon 1967 data. *Id.* Same size and soils. *Id.* One is growing 100 acres of sugar beets and one uses his 100 acres for grazing. *Id.* Since 1967, Farmer One is taxed on sugar beets (classified as irrigated land by DOR); Farmer Two is taxed on grazing (substantially lower per acre value). *Id.* In 1969, however, Farmer Two decided to plant sugar beets instead of using his land for grazing. *Id.* Because no comprehensive agricultural reappraisal was done over the ensuing years, Farmer Two continued to be taxed on grazing land

instead of sugar beets. *Id.*

In 2009, based upon the comprehensive agricultural reappraisal described earlier, DOR determines that Farmer Two is raising sugar beets. *Id.* Both Farmer One and Farmer Two's property are now taxed as sugar beets. *Id.* In 2008 sugar beets were taxed at a productive value of $100 per acre. *Id.* Grazing land was taxed at a value of $10 per acre. *Id.* In 2009 sugar beets are taxed at $110 per acre. *Id.* Grazing land is taxed at $20 per acre. *Id.*

DOR phases in the change in value of Farmer One's land using the 2008 value as the starting point. *Id.* The amount phased-in is the difference in the value of 100 acres of sugar beets in 2009 and 100 acres of sugar beets in 2008 (($110 x 100 ac = 11,000) – ($100 x 100 = $10,000) = $1,000 x .1666 = $167 each year over the six year cycle). *Id.*

Petitioners would have DOR phase in the difference in the value of Farmer Two's grazing land as of 2008 ($10 x 100 ac = $1,000) and his land at the value of sugar beets in 2009 ($110 x 100 = $11,000). *Id.* This means DOR would phase in the change in value of $10,000 over the cycle at $1,667 per year ($10,000 x .1666). *Id.* This has the effect of "transitioning" Farmer Two's from grazing to sugar beets over the length of the cycle even though it has been sugar beets for years. *Id.* Under this scenario, Farmer Two benefits from being under assessed from 1969 to 2014, when the change is fully phased-in. *Id.* During this same 45 years, Farmer One and all other tax payers whose properties have been properly valued and assessed bear the burden of Farmer Two's under assessment. *Id.*

DOR normal process would be to calculate a 2008 value to use as the starting point for phase-in. *Id.* The calculated value would be the value of sugar beets in 2008 multiplied by the number of acres ($100 x 100 ac = $10,000). *Id.* The amount to be phased in would be $1,000 - the difference between the value of 100 acres of sugar beets in 2009 and in 2008 - the same as Farmer One. *Id.* Under this scenario then: in 2008 Farmer One would be taxed on a value of $10,000. In 2009 he will be taxed on a value of $10,167. *Id.* Farmer One would see a minimal increase in taxes in 2009. *Id.* In 2008 Farmer Two would be taxed on a value of $1,000. *Id.* In 2009 he will be taxed on a value of $10,167. *Id.* Farmer Two would see a substantial increase in

taxes in 2009, but would be put on equal footing with Farmer One for the remainder of the cycle. *Id.*

If a property is in the same class and subclass of property and no material changes occur to the property that are reflected in the current year taxable value but not in the prior year's taxable value as reflected in the assessment, the prior year's taxable value (which is the fully phased-in value from the prior six year assessment cycle) is the VBR. *Id.* at ¶ 20. When changes occur that are reflected in the current year taxable value that are not in the prior year's taxable value the VBR is a calculated taxable value determined on the basis DOR ascertains best isolates the naturally occurring value changes (which should be subject to the phase-in) from the value changes occurring by actions other than natural price changes. *Id.*

For the 2009 reappraisal, DOR calculated VBR rather than the 2008 full reappraisal; however, since ARM 42.20.502(3) was not administratively amended as done in previous reappraisal cycles (1997 and 2002), DOR, by its own rule, was required to use the prior year VBR for the current year VBR during 2002 or subsequent tax years for Class 3 property that contains a productivity only or grade change. *Id.* at 21. The proposed actions were needed to address three questions associated with the 2009 agricultural land appraisal: (a) the rule change would impact the versions of administrative rules in effect at the time, and needing update for the 2009 appraisal cycle, due to an appearance of conflict between ARMs 42.20.501(25) and 42.20.502(3) stating different approaches to the determination of the VBR for properties with a productivity only change; (b) they would resolve the question of whether DOR should consider productivity as a material, physical change to the property characteristics; and (c) it would make the Rules consistent with DOR's understanding of the intent of section 15-7-111-(2) MCA. *Id.* DOR updated its agricultural manual for the 2009 reappraisal cycle based upon the anticipated administrative rule amendment. *Id.* DOR did not, however, timely update ARM 42.20.502(3). *Id.* Therefore, the calculated VBR resulted in an incorrect application of phase-in for properties with productivity only changes. *Id.* By adopting the new rule, DOR corrected the phase-in for these properties to comport to the requirements of ARM 42.20.502(3), as amended in 2002.

Under the amended Rule, DOR will adjust the VBR productivity error as follows:

a. If the taxpayer timely filed an AB-26, County Tax Appeal Board ("CTAB") appeal, State Tax Appeal Board ("STAB") appeal, or District Court action relating to the 2009 assessment DOR will:

(1) replace the calculated VBR with the prior year VBR of the prior grade;

(2) issue a revised assessment notice for 2009 showing the correct VBR; and

(3) provide the county the information necessary to allow the county to issue a new tax bill.

b. If the taxpayer did not timely file an AB-26, CTAB appeal, STAB appeal, or District Court action relating to the 2009 assessment DOR will correct the VBR calculation beginning in tax year 2010.

c. DOR will correct the VBR and adjust the taxable values each year for the subsequent five years of this reappraisal cycle by one-fifth of the difference in taxable value.

(1) The difference in taxable value is the amount that DOR either under or over assessed in 2009; and

(2) The adjusted taxable value will be used by the counties to apply mill levies to determine taxes owed.

Id. at 22.

There are roughly 90,000 parcels that have "productivity only" changes in the 2009 reappraisal cycle. *Id.* at 23. Each parcel property owner is assigned an assessors code associated with the property in the identified taxing jurisdiction. *Id.* An assessors code is used to consolidate and combine the owner's parcels within that taxing jurisdiction into one assessment notice. *Id.* The assessors codes help local government distribute property tax dollars to the appropriate taxing jurisdiction. *Id.* Therefore, an owner with multiple parcels in multiple taxing jurisdictions can and/or will have multiple different assessors codes assigned to him/her/it. *Id.*

To date, DOR has identified 2,085 unique assessors codes as being affected by technical administrative calculation error "productivity only" changes in 2009. *Id.* at 24. These were the assessors code where the Orion system had a code for a timely AB26/CTAB in 2009. *Id.* The

2,085 figure includes 445 assessors codes with an estimated +/- $5.00 tax impact. *Id.* Under the proposed Rule, these 2,085 assessors codes would receive revised 2009 assessment notices indicating a new 2009 phase in value based on the use of the actual 2008 value as the VBR. *Id.* However, those tax payers with a revised assessment resulting in a +/-$5.00 impact, no tax would be owed under section 15-16-102(7), MCA. *Id.*

There are an additional 47,291 assessors codes that would be affected in 2010 under the proposed Rule. *Id.* at 25. These assessors codes did not have an indication in the Orion system that a timely AB26/CTAB or other action had been filed. *Id.* This figure includes 14,468 with a +/- $5.00 estimated tax impact. *Id.*

At the time of the hearing, DOR believed there are 34,423 assessors codes that will be adjusted under the proposed Rule and section 15-16-102(7), MCA. *Id.* at 26. This is not to say there are 34,423 affected tax payers. *Id.* In this regard, DOR believes there are approximately 500-600 taxpayers, who have timely protested, including Mr. Lucas, deceased, and Lucas Ranch, Inc., whose assessments have been, or will be, adjusted under the proposed Rule to correct the technical administrative rule calculation error relative to the productivity-only phase-in. *Id.* There is an estimated 10,000 taxpayers whose assessments will be adjusted under the proposed Rule for the 2010 tax year throughout the remainder of the cycle. *Id.*

The respective county treasurers are the only sources of information regarding the amount of protested tax dollars (paid under protest, released for some reason or still in the protest fund). *Id.* at 27. In this regard, some individuals would have paid their taxes under protest but did not submit any other documentation or appeal on file and then the protested amount would have been released to the county after the 90-day statutory time period. *Id.*

C. DID PETITIONERS FAIL TO COMMENCE THIS MATTER AS A CLASS ACTION?

Petitioners indicate in their Motion that they elected to proceed under the Montana Rules of Civil Procedure for bringing a class action in this matter. DOR disagrees. It contends Petitioners failed to properly bring this action as a class action. Specifically, DOR argues that instead, Petitioners' Petition specifically incorporates the declaratory relief procedures for the named Lucas

Petitioners as well as "similarly situated taxpayers" as outlined and specifically provided for in section 15-1-406(2), MCA. (Petition, p. 7, ¶ 33). DOR further contends, and the Court agrees, that the Petition failed to assert or seek class relief as contemplated under the Montana Rules of Civil Procedure or section 15-1-407, MCA. Petitioners admit in their Motion that their Petition was filed pursuant to section 15-1-406, MCA. (Motion, p. 3.)

A class action is a representative suit. In order for a Montana district court to even consider whether a class action should even be maintained, the action must have been brought "as a class action." Mont. R. Civ. P. 23(c)(1). The Court agrees with DOR that Petitioners did not bring this matter as a class action. As DOR points out, none of the required Rule 23(a) or (b) elements were pled by Petitioners in their Petition in order for it to be even considered to be maintained as a class action. *See* Mont. R. Civ. P. 23(b). Even their prayer for relief is silent relative to class certification.

However, as indicated by DOR during oral arguments, Montana is a notice pleading state. *See Kunst v. Pass*, 1998 MT 71, ¶ 35, 288 Mont. 264, 957 P.2d 1. Petitioners could have, but elected not to, pursued their section 15-1-406(2), MCA, claim, provided notice as allowed under 15-1-407(3), MCA. Instead, they sought class certification under Rule 23, Mont. R. Civ. P., with section 15-1-407(3) notice.

Arguably, this is a close question. The Court finds, that in the interests of judicial economy, Petitioners did not fail to commence this matter as a class action. Petitioners sought relief on behalf of "all similarly situated agricultural landowners in Montana." As such, DOR had sufficient notice under the law of the relief sought by Petitioners despite the specific lack of artful pleading by Petitioners for purposes of Rule 23 class certification purposes. In this regard, the Court further finds that Petitioners have elected their remedy to pursue relief under Rule 23, Mont. R. Civ. P., class certification as provided under section 15-1-407, MCA, and have waived their right to proceed under section 15-1-406(2), MCA. *See Massett v. Anaconda Copper Co.*, 193 Mont. 131, 136, 630 P.2d 736, 739 (1981). Here, Petitioners, by requesting this Court to certify a class under Rule 23, have pursued that remedy to its final conclusion and are precluded from seeking relief under section

15-1-406(2), MCA. *State ex. rel Crowley v. District Court*, 108 Mont. 89, 96, 88 P.2d 23, 26 (1939); *Glacier Campground v. Wild Rivers, Inc.*, 182 Mont. 389, 401, 597 P.2d 689, 695 (1978).

D. DID PETITIONERS' FAIL TO SATISFY THEIR RULE 23 BURDEN?

1. **Rule 23's Controlling Authority and Application.**

Disposition of Petitioners' class certification motion requires analysis pursuant to Rule 23, Mont. R. Civ. P. Prior to considering the specific criteria articulated in Rule 23(a), however, a decision maker must first make a determination as to whether the class is precisely defined. *Polich v. Burlington Northern, Inc.*, 116 F.R.D. 258, 261 (D. Mont 1987).

If, and only if, a class is precisely defined may a court analyze the four prerequisites identified in Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Sieglock v. Burlington N. Santa Fe R.R.Co.*, 2003 MT 355, ¶¶ 10-12, 319 Mont. 8, 81 P.3d 495. Here, the heavy burden of showing that each of the elements has been met falls on the Petitioners. *Alexander v. JBC Legal Group, P.C.* 237 F.R.D. 628, 630 (D. Mont. 2006).

To determine whether the prerequisites of Rule 23(a) are satisfied, a court must engage in a rigorous analysis. *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 161, (1982). Although an extensive evidentiary showing is not required, a court must have sufficient information "to form a reasonable judgment on each requirement. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). Moreover, a court may consider evidence relating to the underlying merits of the case if they go to the merits of the Rule 23 analysis. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). Here, the nature of the identified Lucas Petitioners claims are directly relevant to a determination of whether the matters in controversy are primarily individual in character or are susceptible to proof in a class action. In addition, the Montana Supreme Court has held that a district court must go beyond the "pleadings to make whatever factual and legal inquiries are necessary in determining whether the proposed class and class representatives meet the requirements for certification under Rule 23." *Matteson v. Mont. Power Co.*, 2009 MT 286, ¶ 68, 352 Mont. 212, 215 P.3d 675.

If the Petitioners fail to establish any one of the prerequisites, a request for class certification

must be denied. *Murer v. Mont. State Comp. Mut. Ins. Fund*, 257 Mont. 434, 849 P.2d 1036 (1993); *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975). For the reasons set forth below, the Court agrees with DOR that Petitioners' motion for class certification should be denied because they failed to establish all of the following required Rule 23(a) elements:

> One or more members of a class may sue or be sued as representative parties on behalf of all members **only if:** (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Mont. Rule Civ. P. 23(a) (emphasis added). A court must find that all four Rule 23(a) elements apply in order to proceed to the Rule 23(b) analysis. *Seiglock v. Burlington N. Santa Fe Ry. Co.*, 2003 MT 355, ¶ 10, 319 Mont. 8, 13, 81 P.3d 495, 498; *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, (1997).

Rule 23(b) provides as follows:

> An action may be maintained as a class action if **the prerequisites of subdivision (a) are satisfied**, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Mont. R. Civ. P. Rule 23(b) (emphasis added). For certification under Rule 23(b)(3), common questions must predominate over individual interests. *Amchem*, 521 U.S. at 623. The predominance requirements are more demanding than the commonality requirement of Rule 23(a). *Id.* "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Zinser v. Accufix Research Institute Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

2. **The putative class lacks sufficient definition.**

The Court agrees with DOR that Petitioners have failed to sufficiently define the class. In their Motion, Petitioners seek certification "for all agricultural landowners affected by the DOR's technical error in calculating correct phase-in amounts for agricultural properties." (Motion, pp. 3-4). Next, they state that "members of the class will be all agricultural landowners for whom DOR erred in calculation of the correct phase-in amounts for the current reappraisal cycle and who have timely paid any portion of their first or second half 2009 property tax payments under protest." *Id.* at p. 4.

Without properly identifying the nature of the assessment, classification, change in classification, change in productivity, a combination change in classification and productivity, and whether the taxpayers' properly protested the assessment, the Court is unable to ascertain the class by reference to objective criteria. *Foster v. City of Oakland*, 2009 LEXIS 1970 (citing *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970)). Moreover, Petitioners' proposed class definition is ambiguous because it does not delineate from the class persons who are similarly situated to the proposed class representatives.

Moreover, the unspoken element of Petitioners' proposed class characteristics is equally troublesome and will require legal and factual determinations as to whether a putative member was subjected to DOR's technical error in calculating the VBR on agricultural properties that experienced productivity changes for tax year 2009 which resulted in an incorrect application of phase-in for properties with productivity only changes. The DOR's efforts changed an old

"grading" system to a soil specific productivity resulting in some form of a productivity change as described in Mr. Reese's affidavit. Productivities had not been updated for many years and isolating the changes to productivity regardless of classification changes that also occurred is impractical. Under Petitioners' requested class, the Court agrees with DOR that an entire field audit would be required for each individual parcel whether it was affected by the error or not. While certainly some determinations may be easily made, in most other instances the determination of who fits this proposed definition will require a "trial within a trial." Petitioners' proposed class definition is so vague, ambiguous and imprecise as to leave it unworkable.

Furthermore, under Petitioners' proposed class, the issue of whether a calculation was made in error must be addressed. It would require an analysis on the merits of each purported agricultural taxpayer protest to determine whether there was a calculation error. The class definition as proposed by the Petitioners also does not consider the impact associated with those parcels that were overvalued in the past due to incorrect classification or productivity assignment. The DOR's 2009 reappraisal corrected those properties, and the result was a reduction in value. Although rare due to the multiple changes that were occurring on properties, valuation reductions still have occurred and are not represented by the Petitioners' vague definition of class. The class cannot be defined by subjective criteria or that which requires a determination of ultimate liability. *See DeBremaecker*, 433 F.2d at 734.

Petitioners' proposed class definition is so ambiguous that this Court will be forced to have mini-trials to identify the Class. It is also so imprecise that the class will contain members that will not have a claim as envisioned by the Petition (e.g. because there was no reclassification of land use or change in land use but there is a protest), as well as those putative members who had the correct phase-in calculation applied to their property (full phase down in value for properties with a lower reappraisal value, *Roosevelt v. DOR*, 293 Mont. 240, 975 P. 2d 295 (1999)), but protested anyway and thus each require individualized determinations.

Accordingly, the Court finds that Petitioners failed to precisely define their putative class. *Polich v. Burlington Northern, Inc.*, 116 F.R.D. 258, 261 (D. Mont 1987). As such, Petitioners'

motion for class certification must be denied. Even assuming arguendo that they have sufficiently defined a putative class, their request for certification must fail for the reasons noted below.

3. **A properly defined class may satisfy the numerosity requirement.**

The initial requirement of Rule 23(a)(1) demands that the Petitioners first show that the class is so numerous that joinder of all members is impracticable. The Court agrees with DOR that if the defined class consisted of only those taxpayers who timely and properly protested their productivity only phase-in assessment, the numerosity requirement may be satisfied. Since Petitioners failed to properly define the proposed class, their speculative estimate of potential class members is not sufficient. Moreover, they provided no reason or methodology for determining the numbers of potential members in the vaguely defined and proposed class. *Polich*, 116 F.R.D. at 261. Without some substantive determination of the putative members, Petitioners have failed to satisfy their burden with respect to numerosity.

Based upon Mr. Reese's testimony, there appears to be approximately 500-600 taxpayers, who have timely protested, including Mr. Lucas, deceased, and Lucas Ranch, Inc., whose assessments will be adjusted under the adopted DOR Rule to correct the technical calculation error relative to the productivity-only phase-in. In this regard, if the class definition was precisely defined, Petitioners would have satisfied Rule 23(a)'s numerosity requirement.

4. **Plaintiffs' putative class lacks commonality.**

The commonality element of Rule 23(a)(2) requires the proposed class to have common issues of fact or law. Commonality is not present where each putative member brings a unique set of facts to the case. *Polich*, 116 F.R.D at 261. Rule 23(a) requires that the class have common issues of fact or law. The *Polich* Court addressed the commonality requirement. It noted that commonality is not present where each putative member brings a unique set of facts to the case. *Id.* In that case, the putative class was proposed to be former employees of Burlington Northern who lost their jobs in Livingston when the railroad shut down the locomotive shop. *Id.* The *Polich* Court found that the employees were disparate factually - some lost their jobs, some transferred, some were separated from their families, some were not. *Id.*

Here, the Court agrees with DOR that the proposed class is disparate. As described in Mr. Reese's affidavit, each agricultural parcel in the state was reviewed in one manner or another. The appraisal of each agricultural parcel was based on that individual review. The changes identified for each agricultural parcel were specific to that parcel, and there is no common element between them other than the reappraisal itself. Some putative members may have simply protested their payment absent any reclassification of their agricultural property. Others may have protested despite an accurate assessment calculation by DOR. Some may have protested in response to published advertisements or articles with no consideration about the actual impacts to their properties. Many putative class members have converted their land's classification, use, boundaries, productivity or some combination thereof several assessment periods ago and will have been paying an incorrect assessment. While it is understandable that these corrections caused some concern, the corrections are required to ensure the conditions of Montana Code are met.

In addition, the absence of such common questions of fact and law led to the denial of a request for class certification in *Polich*. *Id.* at 262. As the *Polich* Court noted, uniqueness of the claim also raises doubt as to whether the numerosity requirement can be satisfied. *Id.* Not only is it questionable whether that Petitioners can ever meet the numerosity requirement here, it is a virtual certainty that they can never meet the commonality requirement. Petitioners' class certification request fails as to the second required element and must therefore be denied.

The Court further recognizes that In order to achieve the relief sought, individualized determinations must be made with regard to each individual putative class member. That means a mini-trial on the factual and legal issues. These distinct individualized issues completely overwhelm the common issues. Consequently, since there is not a sufficient nexus of common issues of fact or law, the Court finds that Petitioners proposed class lacks the commonality sufficient for certification under Rule 23(a)(2).

5. **Plaintiffs' putative class lacks typicality.**

The third element, Rule 23(c), requires that the claims or the defenses of the representative parties are typical of the claims or defenses of the class. To meet the typicality requirement, the

named representatives must be able to establish the bulk of the elements of each class member's claims when they prove their own claims. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). On the other hand, representative claims are not typical if they are grounded in factual situations differing from those of other class members. The *Falcon* Court noted that the commonality and typicality requirements tend to merge because both help insure that the class action is economical and that the interest of other class members are fairly and adequately protected. *Falcon*, 457 U.S. at 157 n. 13.

In addition the *Polich* Court held:

> The factual variance identified above preclude this court from ruling that the typicality requirement has been met herein. While the affected employees all would proceed under the same theories of fraud and promissory estoppel, the success or failure of such class members's claims would depend on individual facts peculiar to his or her own situation. The class members would not necessarily benefit from any success enjoyed by [the named] plaintiffs ... with respect to their own individual claims and circumstances.

Polich, at 262.

A putative class must have a sufficient nexus between the injury suffered by the plaintiffs and the injury suffered by the class. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1321 (9th Cir. 1982). The typicality requirement is designed to assure the named representatives' interests are aligned with those of the class. *Id.* A named plaintiff's claim is typical if it stems from the same event, practice or course of conduct that forms the basis of the putative class claims and is based upon the same legal or remedial theory. *Id.*

Other courts, including the United States Supreme Court, have concluded that a plaintiff cannot represent a class of whom they are not a part. *Bailey v. Patterson*, 369 U.S. 31 (1962); *see also, Easter v. American West Fin.*, 381 F.3d 948, 962 (9th Cir. 2004) (holding that debtors who sued banking institutions could not sue those who never loaned named plaintiff's money); *Thompson v. Board of Ed. of Romeo Community Schools*, 709 F.2d 1200, 1204-05 (6th Cir. 1983)(holding a class of teachers may not sue a class of defendants by whom they had not been employed). The Ninth Circuit has ruled that a plaintiff cannot represent a class having no causes of action against other defendants against whom the plaintiff has no cause of action and from whose

hands she suffered no injury. *LaMar v. H. & B Novelty & Loan Co. et al.*, 489 F.2d 461, 466 (9th Cir. 1973).

The Court agrees with DOR that Montana Farm Bureau Federation and the Montana Taxpayers' Association do not qualify under the proposed class definition because they are not agricultural taxpayers, and therefore would not have paid taxes on agricultural parcels under protest. This leaves only the individual Lucas Petitioners as the class representatives and since they filed AB-26s on their identified parcels and corrective adjustments are underway, they do not represent the proposed class in any significant respect.

Accordingly, since the Petitioners and the proposed class, primarily Montana Farm Bureau Federation and the Montana Taxpayers' Association, are so unrelated the class lacks the typicality necessary for certification.

6. **Plaintiffs do not adequately represent the putative class.**

Pursuant to Rule 23(a)(4), the proposed representative parties must fairly and adequately protect the interest of the class". To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon v. Chrysler Corp*, 150 F.3d 1011, 1020 (9th Cir. 1998) (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class. *Id.* (citing *Lerwill v. Inflight Motion Pictures, Inc.* 582 F.2d 507, 513 (9th 1978)). As noted above, Petitioners are unable to precisely define any class. Evaluation of the elements as to Rule 23(a)(4) is simply impossible as Petitioners cannot adequately represent a class that does not exist. Accordingly, Petitioners cannot meet their burden with regard to the final element of Rule 23.

In addition, as indicated above, Montana Farm Bureau Federation and the Montana Taxpayers' Association cannot possibly adequately represent the proposed class. Moreover, the adequacy of representation requirement "depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and

absentees, and the unlikelihood that the suit is collusive." *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003). In this regard, Petitioners have not satisfied this burden. As pointed out by DOR during oral arguments, Petitioners have not moved for the appointment of class counsel.

7. **Plaintiffs failed to satisfy Rule 23(b).**

Although Petitioners have failed to establish all of Rule 23(a)'s requirement elements, they also failed to carry their Rule 23(b) burden. Specifically, Petitioners seek Rule 23(b)(2) relief. They have waived any right for Rule 23(b)(1) or 23(b)(3) relief.

Petitioners' claim that DOR acted or refused to act on grounds generally applicable to the proposed class is incorrect. There can be no dispute that DOR took corrective administrative action relative to the phase-in for productivity only changes to comport to the requirements of ARM 42.20.502, as amended in 2002. *See* ARM 42.20.607. The Department took affirmative steps to avoid over collection of taxes. On this basis alone, Petitioners' Rule 23(b(2) certification request is moot. There is no justiciable controversy and Petitioners' certification request is an intolerable substitute for DOR's administrative mechanism for correcting its error in calculating the VBR on agricultural properties that experienced productivity changes. *See Jepson v. Idaho State Tax Commission*, Idaho Dist. Court, Fourth Judicial District, CVOC 0911660, p. 7 (12/23/09) Commission's administratively implemented remedy defeats Rule 23(b) contention).

In addition, as the *Burton* Court recognized, where damages are portrayed as injunctive relief, as is the case here where Petitioners are asking for a refund, seeking an order compelling payment of money, is nothing more than a request for money damages. *Burton v. Mountain West Bureau Mut. Ins. Co.*, 214 F.R.D. 598, 610 (D. Mont. 2003). Incidental monetary damages appropriate under Rule 23(b)(2) certification should arise from wrongs to the class as a whole, not from circumstances that require fact finding on individual class members' cases. *Id.* The *Burton* Court found that "an injunctive remedy in the form of an order compelling payments of benefits is nothing more than request for money damages." Additionally, any "declaratory" ruling as envisioned by Petitioners would necessarily require this Court to a judicious fact finding mission for each individual putative class member. *Id.* The Court agrees with DOR that individual fact finding

will be crucial to establish the putative class claims. As an example, whether each putative member's property was erroneously reclassified will require the kind of individualized determinations that *Burton* prohibits. For this reason as well, certification under Rule 23(b)(2) is inappropriate.

For these reasons certification under Rule 23(b)(2) is inappropriate.

E. PETITIONERS' PROPOSED NOTICE

While class actions maintained under Rule 23(b)(2) do not require individual notice since they are subject to Rule 23(d)'s discretionary notice requirements, *See Olenhouse v. Commodity Credit Corp.*, 135 F.R.D. 672, 681 (D. Kan. 1991), Petitioners' request for the Court to approve their proposed notice is moot since they failed to establish all of the required Rule 23 elements to certify a class.

CONCLUSION

Petitioners have failed to carry their class certification burden as required under Rule 23 of the Montana Rules of Civil Procedure.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Petitioners' Motion for Class Certification is denied; and

2. Petitioners' Request to approve their proposed notice is denied as moot.

The Clerk of Court is directed to file this Order Denying Petitioners' Motion for Class Certification, and provide copies to counsel of record.

DATED this 25th day of October, 2011.

Hon. Randal I. Spaulding, District Judge

xc: Michael Green, Counsel for Petitioners
C.A. Daw/Michele Crepeau, Counsel for Montana Dept. of Revenue
Michael F. McMahon, Co-counsel for Montana Dept. of Revenue